No. 17-1094

# In the Supreme Court of the United States

NUTRACEUTICAL CORPORATION,
*Petitioner*,

v.

TROY LAMBERT,
*Respondent*.

*On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

Ten days after the district court decertified a class action, Respondent Troy Lambert orally informed the district court at a status conference—on the record—that he intended to file a written motion for reconsideration, and outlined the reasons why reconsideration was warranted. Lambert then filed his written motion for reconsideration when instructed by the district court—20 days after the decertification order—within the time permitted by Federal Rule of Civil Procedure 59(e). Fourteen days after the district court denied reconsideration, Lambert filed a petition for permission to appeal under Federal Rule of Civil Procedure 23(f). Did the Ninth Circuit correctly conclude that Lambert's Rule 23(f) petition was timely?

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## STATEMENT

Petitioner Nutraceutical Corporation ("Nutraceutical") asks this Court to determine that Federal Rule of Civil Procedure 23(f) is insusceptible to equitable exceptions, and therefore find that Respondent Troy Lambert's ("Lambert") appeal to the Ninth Circuit should not have been addressed on the merits. Pet. Br. 16-37. Nutraceutical's argument, however, is premised on the incorrect assumption that the timing of Respondent Troy Lambert's ("Lambert") petition for permission to appeal violated Rule 23(f) in the first instance. *See* Pet. for Cert. 3 (stating that Lambert "fail[ed] to timely file a Rule 23(f) petition or a motion for reconsideration within the fourteen-day window"); Pet. for Cert. 6 (stating that "Lambert did not file a petition or a motion for reconsideration by [March 6, 2015]"); Pet. for Cert. 7 (stating that Lambert's petition for permission to appeal was "filed more than four months late"). But Nutraceutical is incorrect, because its theory hinges entirely on the erroneous premise that Lambert's reconsideration motion was untimely.

In fact, after the district court entered an order decertifying this class action, Lambert timely presented an oral motion for reconsideration to the district court at a status conference on March 2, 2015—10 days after the original decertification order—and followed up with a written motion for reconsideration on March 12, 2015, 20 days after the original decertification order. Lambert's request for reconsideration was therefore timely under the Federal Rules. *See* Fed. R. Civ. P. 7(b)(1) (providing that an oral motion can be made at a hearing); Fed. R. Civ. P. 59(e) (providing that "[a]

motion to alter or amend a judgment" can be filed "no later than 28 days after the entry of the judgment"); *see also* Fed. R. Civ. P. 54(a) (defining "judgment" as "any order from which an appeal lies"); Fed. R. Civ. P. 23(f) (providing for "an appeal from an order granting or denying class-action certification"). In addition to being timely under the plain language of the Federal Rules, Lambert's reconsideration motion was also filed within the time set by the district court. Because Lambert's reconsideration motion and appeal were timely under any standard, the Ninth Circuit properly granted permission to appeal and proceeded to the merits.

The relevant facts are as follows. In 2013, Lambert, on behalf of himself and others similarly situated, filed suit alleging that Nutraceutical violated California consumer fraud law with the sale of its Cobra Sexual Energy pill. Pet. App. 53. The case involves Nutraceutical's sale of a purported aphrodisiac claiming to contain "Horny Goat Weed" and a "Stimulating Brazilian herb known as 'potency wood.'" JA65; JA144. In 2014, the district court granted class certification. Pet. App. 28. The class was limited to people who purchased Nutraceutical's products in California on or after August 14, 2009. Pet. App. 53. After the initial district judge's retirement and the case's reassignment, Nutraceutical moved to decertify on a number of grounds. Pet. App. 4.

On February 20, 2015, the district court granted the motion, rejecting some of Nutraceutical's arguments, but agreeing that the plaintiff had failed to accumulate evidence sufficient to calculate restitution under California law. Pet. App. 4. At a status conference on

March 2, 2015—10 days later—Lambert asked the district court to recertify the class, outlining the product-pricing evidence that was already in the record in Nutraceutical's filed but unresolved motion for summary judgment. Pet. App. 5; Pet. App. 14; Pet. App. 71-76. The district court then granted leave for Lambert to file a motion for reconsideration and set a briefing and hearing schedule for that motion, requiring that Lambert file his motion by March 12, 2015. Pet. App. 76; Dist. Ct. Rec. 178. Nutraceutical raised no objection to this schedule. In accordance with the district court's order and Federal Rule of Civil Procedure 59(e), Lambert filed the motion for reconsideration on March 12, 2015, the date set by the district court, and 20 days after the decertification order. Pet. App. 5; JA5-6; Dist. Ct. Rec. 183.

On June 24, 2015, the district court denied Lambert's motion for reconsideration. Pet. App. 27-51. The district court recognized the reconsideration motion as a motion under Rule 59(e), and invoked the Rule 59(e) standards in deciding the motion. Pet. App. 29-31. Although it did not recertify the class as Lambert hoped, the district court did modify its prior order based on one of Lambert's arguments: that the decertification order erred by not providing for notice of decertification to the class. Pet. App. 49-50. Fourteen days later, Lambert petitioned the Ninth Circuit for permission to appeal under Rule 23(f), which was granted. JA17-38; JA60-61. After briefing and oral argument, the Ninth Circuit: (i) concluded that the appeal was timely; and (ii) reversed the district court's decertification because it misapplied California authorities on restitution under the state Unfair Competition Law. Pet. App. 1-26. Nutraceutical now

seeks this Court's review of the Ninth Circuit's timeliness conclusion, but does not challenge the Ninth Circuit's decision on the merits.

## SUMMARY OF ARGUMENT

Nutraceutical's argument is premised on the assumption that Lambert's Rule 23(f) appeal could be deemed timely only if equitable tolling were applicable. While the Ninth Circuit was correct in finding that equitable tolling was appropriate under the circumstances, it need not have reached the issue because Lambert's appeal was timely under the plain language of the Federal Rules.

*First*, in at least three independent ways, Lambert timely sought reconsideration of the district court's decertification order. Lambert's March 2, 2015 oral request for the district court to revisit its February 20 decertification order (along with his reasons for so requesting) constituted a Rule 59(e) oral motion under Federal Rule of Civil Procedure 7(b)(1). Moreover, Lambert's March 12, 2015 written motion for reconsideration was filed well within the 28-day timeframe for filing a motion under Federal Rule of Civil Procedure 59(e). Under this Court's longstanding case law, such timely motions for reconsideration cause the deadline to appeal to run from the date that the district court disposes of the reconsideration motion—not the date of the original decision. Additionally, Federal Rule of Civil Procedure 23(c)(1)(C) provides that a certification decision "may be altered or amended before final judgment." The district court's June 24, 2015 denial of reconsideration "altered or amended" its previous order by both discussing in more detail the reasons for

decertification, and also by correcting the prior order's failure to provide for notice of decertification. Pet. App. 50; *see also* Pet. App. 6 (recognizing that "the [reconsideration] order set forth a plan for notifying the class regarding decertification"). Because Lambert's petition for permission to appeal was filed on July 8, 2015—within 14 days of the district court's June 24, 2015 denial of reconsideration—the appeal was timely without the need to invoke any equitable exceptions.

*Second*, the Federal Rules and this Court's longstanding case law—as well as case law from the courts of appeals—confirm that nonjurisdictional claim-processing rules in the Federal Rules are generally subject to equitable exceptions such as equitable tolling. As this Court has long recognized, and as the history of the Federal Rules shows, the Federal Rules are designed to facilitate disposition of cases on the merits. Indeed, the Federal Rules are heavily based upon procedures that were historically followed in courts of equity, which recognized the importance of equitable tolling. The Rules reflect this history, requiring that they be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Recognizing equitable tolling is entirely consistent with this mandate.

Nutraceutical argued in its certiorari petition that nonjurisdictional claim-processing rules are categorically insusceptible to equitable exceptions. Pet. for Cert. 16 ("Although this Court has not squarely addressed whether mandatory claim-processing rules are subject to equitable exceptions, its precedent

suggests that they are not."). Now, apparently recognizing that the Federal Rules were intended to be applied flexibly, Nutraceutical has abandoned this absolute position. Pet. Br. 17 ("Although this Court has 'reserved' whether claim-processing rules are subject to equitable exceptions . . . its longstanding precedent demonstrates that at least some are not."). Instead, Nutraceutical argues only that Civil Rule 23(f) is not subject to equitable exceptions. But Nutraceutical's arguments are based on a misreading of the Federal Rules and this Court's precedents.

Contrary to Nutraceutical's arguments, nothing in the Federal Rules precludes Rule 23(f) from being read to permit equitable tolling. Nutraceutical's heavy reliance on Appellate Rule 26(b)—which provides that a court may not "extend" the time to petition for permission to appeal—is misplaced. In relying so heavily on this prohibition, Nutraceutical entirely ignores that the application of equitable tolling to Rule 23(f) does not constitute an "extension" of the deadline. Rather, it simply recalibrates the date from which the 14-day deadline begins to run. Nothing in Rule 26(b) prohibits this. Moreover, even if the application of equitable tolling were viewed as giving a putative appellant additional time to petition for permission to appeal, Nutraceutical ignores that Rule 26(b) expressly draws a sharp distinction between: (i) "extending" a deadline; and (ii) permitting an act to be done after the expiration of the deadline. Rule 26(b) prohibits only the former. Because the application of equitable tolling at most permits an act to be done after expiration of what the deadline otherwise would be, equitable tolling is entirely consistent with Rule 26(b). Accordingly, the Ninth Circuit's decision in no way violates the

Appellate Rule 26(b). For the same reason, the Ninth Circuit's decision comports with Appellate Rule 2, which simply provides that Rule 26(b) cannot be suspended. The Ninth Circuit's decision is also consistent with the remainder of the Federal Rules, which make clear when a provision is to be applied unyieldingly. Rule 23(f) is not such a provision.

*Third*, Nutraceutical incorrectly argues that the Ninth Circuit inappropriately analyzed the equities in the facts of this case. As an initial matter, this factbound argument is not fairly included in the Question Presented, and therefore should not be considered. Regardless, Nutraceutical is mistaken. Nutraceutical does not genuinely dispute that had the district court set a 14-day deadline for filing a motion for reconsideration (which Nutraceutical concedes would have caused the deadline to appeal to run from the disposition of the reconsideration), Lambert would have filed his motion by that deadline. Moreover, this Court has long held that an appeal should be considered on the merits if a party relies on a district court's erroneous assurances regarding the timeliness of a motion that would otherwise suspend the time to appeal. These precedents continue to apply to nonjurisdictional time limits such as Rule 23(f).

In sum, Lambert's appeal was timely under the plain language of the Federal Rules, so it is unnecessary to decide whether Rule 23(f) is subject to equitable considerations such as equitable tolling. But even if the Court disagrees on this antecedent issue, the text and history of the Federal Rules unmistakably demonstrate that Rule 23(f) can be subject to equitable tolling. Simply put, the Ninth Circuit's judgment

represents a straightforward and correct application of this Court's precedents and the Federal Rules. Therefore, the Ninth Circuit's judgment should be affirmed.

## ARGUMENT

### I. Lambert's Appeal Was Timely Under the Federal Rules and This Court's Longstanding Precedents

Nutraceutical's argument is premised on the assumption that the timing of Lambert's appeal violated Rule 23(f). But this assumption is incorrect. *First*, at a status conference held 10 days after the district court's decertification order, Lambert orally presented the district court with reasons why the class should be recertified. This presentation constitutes an oral motion under the Federal Rules of Civil Procedure. Therefore, even under Nutraceutical's apparent view that a reconsideration motion must be filed within 14 days of the decertification order in order to postpone the period to seek appellate review under Rule 23(f), Lambert's appeal was timely. *Second*, Lambert's written motion for reconsideration was filed 20 days after the decertification order, and was therefore timely under Federal Rule of Civil Procedure 59(e). Under the Federal Rules and this Court's precedents, such a timely motion causes the time to appeal to run from the disposition of the reconsideration motion, not from the original order. Because Lambert's appeal was filed within 14 days of the district courts' disposition of the reconsideration motion, the appeal was timely. *Third*, Federal Rule of Civil Procedure 23(c)(1)(C) provides that a certification decision "may be altered or amended before final judgment." The district court's

June 24, 2015 denial of reconsideration altered and expanded upon the original decertification order. Because Lambert's petition for permission to appeal was filed on July 8, 2015—within 14 days of the district court's June 24, 2015 order—the appeal was timely without the need to invoke any equitable exceptions.[1]

### A. Lambert Timely Sought Reconsideration Under Federal Civil Rule 59(e) and Under the District Court's Order, Therefore Postponing the Time to Appeal Until After the District Court Disposed of the Reconsideration Motion

#### 1. Lambert's Written and Oral Requests for Reconsideration Were Timely Under Rule 59(e)

The district court's February 20, 2015 decertification order constitutes a "judgment" within the meaning of the Civil Rules, because it is "an[] order from which an appeal lies." Fed. R. Civ. P. 54(a); *see also* Fed. R. Civ. P. 23(f) (providing that a court of appeals may permit "an appeal from an order granting or denying class-action certification"). And under Federal Rule of Civil Procedure 59(e), a party may move to alter or amend a judgment "no later than 28 days after the entry of the judgment." Fed. R. Civ.

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[1] In addition to being discussed in detail below, Lambert's Brief in Opposition explains the multiple reasons why equitable considerations need not be invoked in order to affirm the Ninth Circuit's judgment. Opp. 1-19.

P. 59(e).[2] Lambert's written motion for reconsideration was filed on March 12, 2015—20 days after the district court's decertification order, and therefore well within the 28-day timeframe set forth in Rule 59(e). Accordingly, as explained in more detail below, the motion for reconsideration postponed the time to appeal, and Lambert's appeal was therefore due within 14 days of the denial of the motion for reconsideration, and was filed within this time. Because Lambert's petition was filed on July 8, 2015—14 days after the denial of reconsideration—the Ninth Circuit's judgment should be affirmed.

A motion falls under Rule 59(e) "where it involves 'reconsideration of matters properly encompassed in a decision on the merits.'" *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989) (quoting *White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 451 (1982)). Here, Lambert's motion for reconsideration asked the district court to vacate its decertification order (i.e., the order giving rise to an interlocutory appeal under Rule 23(f)), and recertify the class. The motion for reconsideration was therefore a Rule 59(e) motion, and indeed, the district court recognized it as such. Pet. App. 29 (recognizing that "a motion for reconsideration brought within 28 days of the entry of judgment is treated as a motion under Rule 59(e)" and invoking the standards under Rule 59(e) in deciding Lambert's motion for reconsideration); *see also McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (recognizing that a motion for reconsideration of

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[2] Before December 1, 2009, Rules 59(e) and 23(f) were both subject to a 10-day deadline.

an order denying class certification is a Rule 59 motion).

As many courts have recognized, Rule 59(e) applies not only to final judgments, but also to interlocutory orders from which an appeal could lie. The Ninth Circuit recognized as much during oral argument here, and at least twice suggested that Lambert's reconsideration motion was in accordance with Rule 59. Oral Argument at 2:36-38 and 14:15-36, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181. Additionally, the First Circuit held that a motion for reconsideration of an appealable interlocutory order constituted a Rule 59(e) motion because the underlying order was "an order from which an appeal lies" under Rule 54(a). *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7-8 (1st Cir. 2005). Accordingly, the First Circuit held the time to appeal ran from the disposition of the reconsideration motion, not from the date of the original order. *Id.* Other decisions are in accord. *See, e.g.*, *Auto Servs. Co. v. KPMG, LLP*, 537 F.3d 853, 856 (8th Cir. 2008) (noting that for purposes of Civil Rules 54(a) and 59(e) and Appellate Rule 4(a)(4)(A)(iv), a "'judgment' encompasses both a final judgment and an appealable interlocutory order"); *Robertson v. Monsanto Co.*, 287 F. App'x 354, 358 (5th Cir. 2008) (applying the definition of "judgment" set forth in Rule 54(a) to interlocutory appeals under Rule 23(f)); *Lichtenberg v. Besicorp Grp. Inc.*, 204 F.3d 397, 400-01 (2d Cir. 2000) (recognizing that a "judgment" under the Civil Rules encompasses both a final judgment and an appealable interlocutory order); *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989) (same); *Rodriguez v. Banco Cent.*, 790 F.2d

172, 175-76 (1st Cir. 1986) (finding that Rule 59(e) applies to interlocutory orders based on Rule 54(a) and noting that "[l]ittle purpose would be served in penalizing a party for requesting a district court to reconsider a disputed interlocutory ruling before attempting to take its grievance to the court of appeals"). Here, the district court's decertification order constitutes an "order granting or denying class-action certification" from which "[a] court of appeals may permit an appeal" and is therefore "an order from which an appeal lies." Fed. R. Civ. P. 23(f); Fed. R. Civ. P. 54(a). Lambert's motion for reconsideration of the decertification order therefore was a timely motion under Rule 59(e).

Additionally, Lambert, at the district court's status conference on March 2, 2015, orally outlined the reasons why the district court should recertify the class. Pet. App. 71-72. In other words, Lambert presented an oral motion seeking the district court's reconsideration of the decertification order under Rule 59(e). Oral motions are permitted if "made during a hearing or trial." Fed. R. Civ. P. 7(b)(1)(A). As the Ninth Circuit recognized, Lambert, at the March 2 hearing, "informed the court of his intention to file a motion for reconsideration" and "explained that he had a damages model and evidentiary support for it." Pet. App. 5; *see also* Pet. App. 13-14. Accordingly, even if this Court were to accept Nutraceutical's argument that Lambert's motion for reconsideration had to be filed within 14 days of the district court's decertification order (*see* Pet. Br. 43-45; Reply for Pet. 5) (which it should not, as explained below), Lambert's March 2, 2015 oral motion—made 10 days after the decertification order—was timely even under

Nutraceutical's proposed standard. The Ninth Circuit recognized the possibility that this oral explanation was an oral motion. Oral Argument at 2:55-3:21, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181.

Moreover, Lambert's reconsideration motion was timely because it was filed within the time expressly permitted by the district court. Specifically, the district court, at the March 2 status conference, gave Lambert until March 12, 2015 to file a motion for reconsideration. Pet. App. 75-76. In compliance with the district court's order, Lambert moved for reconsideration on March 12, 2015. JA5; Pet. App. 5. For this independent reason, Lambert's reconsideration motion was timely filed.

In sum, Lambert's reconsideration motion complied with the district court's order and with Civil Rule 59(e). Both of these reasons independently establish that Lambert's reconsideration motion was timely.

**2. Because Lambert Filed a Rule 23(f) Petition Within 14 Days of the Denial of His Timely Filed Reconsideration Motion, the Appeal Was Timely**

**a. This Court's Longstanding Precedents Confirm that Lambert's Appeal Was Timely**

Because Lambert timely moved for reconsideration, this Court's precedents dictate that the 14-day period for Lambert to file a Rule 23(f) petition began to run when the reconsideration motion was denied. This Court has long held that a timely filed motion for

reconsideration causes the time to appeal to run from the disposition of the reconsideration motion. For instance, in *United States v. Ibarra*, 502 U.S. 1 (1991), this Court summarily reversed the Tenth Circuit for: (i) concluding that a motion for rehearing did not toll the time to appeal; and (ii) dismissing the appeal as untimely. In particular, this Court recognized that in both civil and criminal cases, "a motion for rehearing . . . renders an otherwise final decision of a district court not final until it decides the petition for rehearing." *Ibarra*, 502 U.S. at 6. Under this rule, "district courts are given the opportunity to correct their own alleged errors, and allowing them to do so prevents unnecessary burdens being placed on the courts of appeals." *Id.* at 5. Indeed, it has been "the consistent practice in civil and criminal cases alike . . . to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending." *United States v. Dieter*, 429 U.S. 6, 8 (1976).

In recognizing this principle, this Court dismissed the Tenth Circuit's "concern with the lack of a statute or rule expressly authorizing treatment of a [reconsideration] motion as suspending the limitation period[,]" and instead concluded that it has been a "'traditional and virtually unquestioned practice'" for the time to appeal to run from the disposition of a timely reconsideration motion. *Id.* at 8, 8 n.3 (quoting *United States v. Healy*, 376 U.S. 75, 79 (1964)); *see also Healy*, 376 U.S. at 80 (recognizing "the ordinary rule" that an appeal need not be filed while a petition for rehearing is under consideration). Simply put, when a rehearing request is "duly and seasonably filed," the time to appeal "begins from the date of the denial of

either the [rehearing] motion or petition." *Morse v. United States*, 270 U.S. 151, 153-54 (1926) (citations omitted); *see also Aspen Mining & Smelting Co. v. Billings*, 150 U.S. 31, 36 (1893) (recognizing that when a reconsideration motion is timely filed, "the judgment or decree does not take final effect for the purposes of the writ of error or appeal"). Based on these precedents, Lambert's Rule 23(f) petition was timely because it was filed within 14 days of the district court's order denying reconsideration.

Nutraceutical's attempt to distinguish this Court's longstanding precedents (Pet. Br. 43-45) fails. In particular, Nutraceutical seizes on this Court's statement in *Healy* that a rehearing petition suspends the time to appeal if filed "within the permissible time for appeal." Nutraceutical Br. at 43-44 (citing *Healy*, 376 U.S. at 77-78). But in *Healy*, there was an "absence of any statute or rule governing the effect of rehearing petitions of the Government[.]" *Healy*, 375 U.S. at 79. Here, in sharp contrast, there is no such absence. Rather, Civil Rule 59(e) expressly provides for the filing of motions to alter or amend the judgment within 28 days of the challenged decision. Additionally, as explained in further detail below, Appellate Rule 4(a)(4)(A)(iv) expressly confirms that a timely Rule 59(e) motion suspends the time to appeal. Because Lambert filed his Rule 59(e) motion well within the 28-day period, the 14-day period to appeal did not begin to run until the district court disposed of the motion on June 24, 2015. Lambert's Rule 23(f) petition—filed within 14 days of June 24, 2015—therefore was timely.

This Court's treatment of the effect of rehearing petitions on the time to petition for certiorari further demonstrates that Lambert's appeal was timely. In one case, this Court concluded that a certiorari petition challenging the decision of the Guam Supreme Court was timely where: (i) the certiorari petition was filed within 90 days from the Ninth Circuit's dismissal for lack of jurisdiction after originally having agreed to exercise its discretion to entertain the appeal, even though (ii) the petition was not filed within 90 days of the Guam Supreme Court's decision. *Limtiaco v. Camacho*, 549 U.S. 483, 486-88 (2007). Because the pendency of a rehearing petition "rais[es] the question whether the [lower] court will modify the judgment and alter the parties' rights[,]" this Court recognized that "there is no 'judgment' to be reviewed" during the pendency of such a petition. *Hibbs v. Winn*, 542 U.S. 88, 98 (2004) (citing *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990)). Similarly here, Lambert's motion for reconsideration—filed within the time set by the district court and Civil Rule 59(e)—raised the question whether the district court would modify the decertification order, and therefore suspended the time for Lambert to appeal. Consequently, the 14-day period for Lambert to petition for permission to appeal under Rule 23(f) began to run on June 24, 2015—when the district court denied Lambert's timely filed motion for reconsideration. Lambert's July 8, 2015 Rule 23(f) petition—filed within 14 days of the denial of reconsideration—therefore was timely.

### b. The Federal Rules Confirm that Lambert's Appeal Was Timely

The Federal Rules further demonstrate that Lambert's appeal was timely. Petitions for permission to appeal "must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by [Appellate] Rule 4(a) for filing a notice of appeal." Fed. R. App. P. 5(a)(2). Because Civil Rule 23(f) is silent as to the effect of reconsideration motions on the time to appeal, Appellate Rule 4(a) therefore must be consulted. Under Rule 4(a), "the time to file an appeal runs for all parties from the entry of the order disposing of" a Rule 59 motion. Fed. R. App. P. 4(a)(4)(A)(iv); *see also Gelder v. Coxcom Inc.*, 696 F.3d 966, 970-71 (10th Cir. 2012) (O'Brien, J., concurring) (recognizing that the timely filing of a motion listed in Appellate Rule 4(a)(4)(A) postpones the time to petition for permission to appeal under Rule 23(f)). As Judge O'Brien correctly explained, there is "no need" for Civil Rule 23(f) or Appellate Rule 5 to "speak to motions which might extend the time" to appeal "because [Appellate] Rule 5 specifically refers to [Appellate] Rule 4." *Id.* at 971. Therefore, Rule 4(a)(4)(A)(iv) controls here, and it dictates that Lambert's time to file a Rule 23(f) petition ran from June 24, 2015—when the district court denied his Rule 59(e) motion.

The applicability of Appellate Rule 4(a)(4)(A)(iv) to Civil Rule 23(f) petitions is especially clear because when the Federal Rules seek to preclude an appeal period from being postponed by motion listed in Rule 4(a)(4), they say so explicitly. For instance, in certain

bankruptcy appeals, "Rule[] 4(a)(4) . . . do[es] not apply[.]" Fed. R. App. P. 6(b)(1)(A). Rather, in those bankruptcy appeals, a rehearing motion suspends the time to appeal only if the motion is filed within the 14-day period permitted by Bankruptcy Rule 8022. Fed. R. App. P. 6(b)(2)(A)(i); Fed. R. Bankr. P. 8022(a). The Federal Rules contain no similar language with respect to Civil Rule 23(f) petitions, showing that a timely Rule 59(e) motion suspends the time to file a Rule 23(f) petition.

Because Lambert filed his reconsideration motion on March 12, 2015—well within the 28-day period following the district court's February 20, 2015 decertification order—the reconsideration motion was timely under Rule 59(e). The February 20 decertification order therefore did not become final until June 24, 2015, when it was reconsidered and amended. Consequently, the time to file a 23(f) petition did not begin to run until June 24, 2015. Accordingly, Lambert's July 8, 2015 23(f) petition—filed 14 days after the June 24 order—was timely. *See* Fed. R. Civ. P. 23(f) (providing that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered").

Because Lambert's appeal was timely under the Federal Rules and under this Court's longstanding precedents, the Ninth Circuit's decision can be affirmed on that basis. This case, therefore, "involves no issue of equitable tolling or any other equity-based exception." *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004).

### B. Lambert's Appeal Was Also Timely Based on the Plain Language of Rule 23

#### 1. The District Court's Reconsideration Decision Altered the Previous Decertification Order

A certification decision "may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). The district court's initial decertification order (Pet. App. 27-51) was defective because it did not provide a plan for notice of class decertification. *See* Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(c)(3)(B). The district court's June 24, 2015 denial of reconsideration altered its previous order by addressing, as was required, notice to the class of the decertification. Pet. App. 50. Accordingly, because Lambert filed his Rule 23(f) petition for permission to appeal within 14 days of the district court's altered decertification order, the Rule 23(f) petition was timely, without the need to consider any equitable exceptions.

#### 2. A Reconsideration Decision Triggers the 14-Day Period Under the Plain Language of Rule 23(f)

More broadly, the order denying reconsideration of the decertification simply falls into the category of "an order granting or denying class-action certification." Fed. R. Civ. P. 23(f). In substance, the motion, had it been granted, would have created a certified class that had been previously decertified. The district court denied the motion, so its order was thus "an order . . . denying class-action certification." *Id.* Because a Rule 23(f) petition for permission to appeal is due "within 14 days after the order [denying class-action certification]

is entered," *id.*, and Lambert's petition was filed on July 8, 2015—within that timeframe—Lambert's appeal was timely under the plain language of Rule 23(f). As squarely as the reconsideration order here falls within Rule 23(f)'s language, other Circuit Courts have applied it more expansively, to orders modifying the scope of the class, or decertifying a class. For instance, in *Glover v. Standard Fed. Bank*, 283 F.3d 953, 956-58 (8th Cir. 2002), the decision "granting or denying class-action certification" was an order that changed the class definition of an earlier-certified class.

It makes sense for a reconsideration order to trigger the 14-day time to file a Rule 23(f) petition, because initial class-certification decisions are often made early in the litigation, before the parties have had a chance to engage in discovery. Discovery often uncovers evidence that is probative of whether class certification is appropriate. Parties therefore should not be discouraged from: (i) seeking reconsideration after the factual record is fully developed; and (ii) filing a Rule 23(f) petition only after the district court's reconsideration order, when the court of appeals is in the best position to make an informed decision based on a complete record.

## II. The Ninth Circuit Correctly Recognized that Nonjurisdictional Claim-Processing Rules Are Generally Subject to Equitable Exceptions

As explained in detail above, the timing of Lambert's appeal was in full compliance with the Federal Rules, thus the Court need not consider whether equitable exceptions can apply to nonjurisdictional claim-processing rules such as Rule

23(f). Nevertheless, the Ninth Circuit's recognition that such rules can be subject to equitable exceptions (*see* Pet. App. 10) is fully in accord with this Court's longstanding precedents and precedents from lower courts, which confirm that equitable exceptions can apply to nonjurisdictional claim-processing rules. None of Nutraceutical's cited cases—and none that Lambert could locate—hold to the contrary. Therefore, the judgment should be affirmed.

### A. The History of the Federal Rules Demonstrates that the Rules Are Designed to Be Flexible and Subject to Equitable Exceptions

American jurisprudence has long treated time prescriptions as subject to equitable exceptions. This is most clear with respect to federal statutes of limitations, which this Court has long held are "normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland v. Florida*, 560 U.S. 631, 645-46 (2010) (emphasis in original) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)); *see also United States v. Wong*, 135 S. Ct. 1625, 1632-33 (2015) (recognizing, in interpreting a federal statute of limitations, that a filing deadline is a "quintessential claim-processing rule" that is subject to equitable tolling) (citation omitted). Equitable tolling is "a long-established feature of American jurisprudence derived from 'the old chancery rule[.]'" *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10-11 (2014) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)); *see also Bowen v. City of New York*, 476 U.S. 467, 479-80 (1986) (concluding that the 60-day time period for seeking judicial review of a Social Security Administration

adjudication was subject to equitable tolling); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) (recognizing that a nonjurisdictional deadline was "subject to waiver, estoppel, and equitable tolling").

This Court has aptly described the flexible principles behind equitable tolling:

> [C]ourts of equity must be governed by rules and precedents no less than the courts of law. But we have also made clear that often the exercise of a court's equity powers ... must be made on a case-by-case basis. In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity[.] The flexibility inherent in equitable procedure enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct... particular injustices. Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

*Holland*, 560 U.S. at 649-50 (internal citations omitted). Given the Federal Rules' derivation from the rules of chancery, as explained in detail below, the

presumption in favor of equitable tolling applies equally to the Federal Rules.

In England, litigation historically took place in a two-court system: (i) "common law" or "law" courts; and (ii) "Chancery" or "equity" courts. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 914 (1987). Common-law courts had "countless pleading rules" that could cause parties to "easily lose on technical grounds." *Id.* at 917. Equity courts, in sharp contrast, could "relieve the petitioner from an alleged injustice that would result from rigorous application of the common law." *Id.* at 918. Early American jurisprudence was largely based on the common-law model. *Id.* at 926. Indeed, "[i]n 1789, equity either did not exist or was underdeveloped." *Id.* at 931.

In the nineteenth century, a movement began to introduce equitable principles into American jurisprudence. For example, New York adopted the Field Code of 1848, which "merged law and equity in addition to providing more general rules than the common law." *Id.* at 932. Although the Field Code differed in many respects from traditional English equity practice, the Code, among other things: (i) relaxed the common-law pleading standards by providing that pleadings be made in plain language; (ii) liberalized the opportunity for pleadings to be amended; and (iii) provided for discovery. *Id.* at 934. "The Field Code was adopted in about half the states, covering the majority of the country's population." *Id.* at 939. Although adopting multiple equitable principles, the Field Code differed from traditional

equity practice because it did not permit the same type of judicial discretion and legal flexibility that English equity practice allowed. *Id.* at 934.

Procedural reform also occurred in England in the nineteenth century, derived in some respects from the Field Code. *Id.* at 942-43. However, this procedural reform culminated with rules "that were both simpler and more liberal than the Field Code" and "push[ed] away from a dual common law/equity procedural system, to one looking primarily like equity[.]" *Id.* at 943. These changes "became a beacon for later American procedural reformers." *Id.* at 942.

In the early twentieth century, "[t]he legislative history of what eventually became the Federal Rules of Civil Procedure" began, "at about the time [this Court] was overhauling the equity rules in 1912." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1003 (4th ed. Apr. 2018 update). "The Equity Rules of 1912, now superseded by the Federal Rules of Civil Procedure, abolished the intricacies of former equity pleading and substituted a simple procedure that in some respects resembled code pleading but without the circumstantial minuteness of the latter." *Id.* § 1002. Shortly thereafter, Chief Justice Taft, through: (i) his opinion for the Court in *Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235 (1922); and (ii) remarks before the American Bar Association; urged that law and equity be merged. *Id.* § 1003. This suggestion was ultimately taken. In 1934, Congress passed the Rules Enabling Act, which permitted this Court to "unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and

procedure for both[.]" Pub. L. No. 73-415, § 2, 48 Stat. 1064 (1934). The Federal Rules of Civil Procedure became operative in 1938. Henry P. Chandler, Some Major Advances in the Federal Judicial System 1922-1947, 31 F.R.D. 307, 512 (1962). They provided that the distinction between actions at law and actions at equity would no longer be made, and that there would instead be only one type of action: the "civil action." Fed. R. Civ. P. 2.

Although the Federal Rules of Civil Procedure effected a merger of law and equity, the Rules "were very largely based on the old equity rules." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1008 (4th ed. Apr. 2018 update). Indeed, "[t]he underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law. The expansive and flexible aspects of equity are all implicit in the Federal Rules." Subrin, 135 U. Pa. L. Rev. at 922. In certain matters, such as pleading, joinder, and discovery, the Federal Rules even "went beyond equity's flexibility and permissiveness." *Id.* In sum, "[t]he Federal Rules reflected a philosophy that the discretion of individual judges, rather than mandatory and prohibitory rules of procedure, could manage the scope and breadth and complexity of federal lawsuits better than rigid rules." Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429, 473 (2003).

As demonstrated above, the history of the Federal Rules are heavily based on the rules of equity, and the Rules were designed to increase courts' discretion in individual cases. Given this close kinship between the

Federal Rules and chancery practice, time prescriptions in the Rules—like those in federal statutes of limitations—should be entitled to a presumption in favor of equitable tolling, a doctrine that is based on "'the old chancery rule.'" *Lozano*, 572 U.S. at 10-11 (quoting *Holmberg*, 327 U.S. at 397); *see also Holland*, 560 U.S. at 646 (noting that the presumption in favor of equitable tolling was "reinforced by the fact" that the underlying statutory scheme was governed by equitable principles); *Young v. United States*, 535 U.S. 43, 49-50 (2002) ("Congress must be presumed to draft limitations periods in light of this background principle."). In sum, given the strong connection of the Federal Rules to equitable principles, the Rules should presumptively be subject to equitable considerations such as tolling.

### B. The Federal Rules Further Demonstrate that They Are to Be Interpreted Against the Backdrop of Equitable Principles

The text of the Federal Rules further confirms that they should be interpreted to accommodate equitable principles such as equitable tolling. Specifically, the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. As one commentator has recognized, Rule 1's provision for the "construc[tion]" of the Federal Rules "suggests some flexibility in interpreting the applicable language of the rules." Main, 78 Wash. L. Rev. at 499. Moreover, Rule 1's provision for the "administ[ration]" of the Rules "invites even more flexibility—suggesting a more fundamental or threshold inquiry into the relevance of

a Federal Rule." *Id.* (citing Black's Law Dictionary (6th ed. 1990) (defining "administer" as "to manage or conduct . . . discharge . . . [or] execute")). Accordingly, Rule 1 demonstrates that the Federal Rules are to be interpreted with principles of equity in mind—not in the unyielding manner that Nutraceutical seeks.

### C. This Court's Precedents Demonstrate that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

This Court has long recognized equitable exceptions to provisions set forth in the Federal Rules. Especially illustrative is this Court's longstanding principle that a timely filed motion for reconsideration postpones the time to appeal, even when there is no "statute or rule expressly authorizing treatment of a [reconsideration] motion as suspending the limitation period[.]" *Dieter*, 429 U.S. at 8 n.3; *accord Ibarra*, 502 U.S. at 6; *Healy*, 376 U.S. at 80. The fact that this exception is so well-accepted by this Court—and has been for many decades—demonstrates that the Rules cannot be construed in the rigid and unyielding manner that Nutraceutical seeks.

Other decisions from this Court further demonstrate that the Rules are subject to equitable exceptions. For instance, in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964), a party's motion for a new trial was belatedly filed, but the district court assured him that the motion was filed "in ample time." *Thompson*, 375 U.S. at 386. The party filed a notice of appeal within 60 days of the district court's disposition of the motion for a new trial, but not within 60 days of the original judgment. *Id.* at 384-86.

Had the motion actually been filed "in ample time," the time to file a notice of appeal would not have begun to run until the district court disposed of the motion. *Id.* at 385-86. However, because the motion was untimely, the filing of the motion did not toll the time to appeal. *Id.* The Seventh Circuit therefore dismissed the appeal as untimely. *Id.* at 387.

This Court reversed in view of the "unique circumstances" and directed the Seventh Circuit to consider the appeal on the merits. *Id.*; *see also Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962) (recognizing the "unique-circumstance doctrine," an equitable exception to the notice-of-appeal timing requirement); *accord Osterneck*, 489 U.S. at 179; *Wolfsohn v. Hankin*, 376 U.S. 203, 203 (1964) (summarily reversing the dismissal of an appeal, based upon the reasoning in *Harris Truck Lines* and *Thompson*).

As one commentator noted, this Court recognizes the unique-circumstances doctrine as "an equitable basis upon which to reach the merits of an appeal" that, although untimely, should "be treated as timely because the appellant reasonably relied upon a district court's representation that the appeal period would be lengthier than it turned out to be." Philip A. Pucillo, *Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the "Unique Circumstances" Doctrine*, 82 Tul. L. Rev. 693, 701 (2007). Although this Court in *Bowles v. Russell*, 551 U.S. 205 (2007) overruled *Harris Truck Lines* and *Thompson* "to the extent they purport to authorize an exception to a jurisdictional rule," *Bowles* did not overrule *Harris Truck Lines* or *Thompson* as applied to nonjurisdictional time

prescriptions. *Bowles*, 551 U.S. at 214; *see also Mobley v. C.I.A.*, 806 F.3d 568, 577 (D.C. Cir. 2015) (citations omitted).[3] Indeed, the D.C. Circuit recently applied the unique-circumstances doctrine to excuse the untimely filing of a post-judgment motion. *Mobley*, 806 F.3d at 577-78;[4] *see also Khan v. U.S. Dep't of Justice*, 494 F.3d 255, 258-60 (2d Cir. 2007) (concluding that *Bowles* did not alter the ability of a court to recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950.1 (4th ed. Apr. 2018 update) (recognizing that a nonjurisdictional time period "should be subject in appropriate cases to the 'unique circumstances' doctrine").

Application of the unique-circumstances doctrine to nonjurisdictional time prescriptions is fully consistent with this Court's precedents. As Justice Ginsburg explained, this Court's decisions in *Thompson* and

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[3] As correctly concluded by the Ninth Circuit (and unchallenged by Nutraceutical), the 14-day deadline in Rule 23(f) is nonjurisdictional because it does not appear in a statute. Pet. App. 10; *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 (2017) (recognizing that time prescriptions appearing only in court-promulgated rules are nonjurisdictional); Fed. R. Civ. P. 82 (providing that the Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts").

[4] Although Fed. R. App. P. 4(a)(4)(A)—one of the Rules at issue in *Mobley*—was subsequently amended on December 1, 2016 to no longer permit untimely motions listed in Rule 4(a)(4)(A) to suspend the time to appeal, the relevant events here (i.e., the decertification order, the motion for reconsideration, and the Civil Rule 23(f) petition) all took place in 2015, and therefore are governed by the pre-2016 version of the Appellate Rules that was interpreted in *Mobley*.

*Harris Truck Lines* are "based on a theory similar to estoppel," and time limits found in the Federal Rules should be treated like "[t]ime requirements in lawsuits," which "are customarily subject to 'equitable tolling.'" *Carlisle v. United States*, 517 U.S. 416, 435-36 (1996) (Ginsburg, J., concurring) (quoting 4A Wright & Miller, Federal Practice & Procedure § 1168, at 501); *see also Bowles*, 551 U.S. at 216 (Souter, J., dissenting) (recognizing that nonjurisdictional time limitations "may be waived or mitigated in exercising reasonable equitable discretion[]").

This Court's decision in *Schacht v. United States*, 398 U.S. 58 (1970) is also instructive. There, the petitioner filed a petition for a writ of certiorari outside the time period permitted by the Rules of this Court, and the Government argued that the Court could not consider the merits of the petition because the time period in the Rules cannot be waived. *Schacht*, 398 U.S. at 63. Rejecting the Government's view, this Court explained that the time period to file a petition for a writ of certiorari in a criminal case is not a jurisdictional rule, and that the Rule "contains no language that calls for so harsh an interpretation." *Id.* at 63-64. Rather, the Court explained that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64; *see also Bowles*, 551 U.S. at 212.

These cases are also consistent with this Court's longstanding recognition that cases should not turn on notice-of-appeal technicalities. For instance, in rejecting the notion that a defect in a notice of appeal was fatal to the appeal, this Court concluded that "[i]t is too late in the day and entirely contrary to the spirit

of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962). Similarly, although Appellate Rule 3 requires a "notice of appeal" in order to seek appellate review of a district-court decision and sets forth specific requirements for the notice, this Court held that a document that does not strictly comply with Rule 3 (such as a brief filed in lieu of a proper notice of appeal) can sometimes suffice. *Smith v. Barry*, 502 U.S. 244, 248-50 (1992); *see also Becker v. Montgomery*, 532 U.S. 757, 768 (2001) (concluding that an appellant's failure, in violation of the Rules, to sign a notice of appeal was not fatal to the appeal, and finding that the court of appeals should have accepted the appellant's corrected notice of appeal); *cf. Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (recognizing, in the class-action context, that "finality [for purposes of appeal] is to be given a practical rather than a technical construction"); *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 387 (1978) (refusing to give the separate-judgment requirement an interpretation that would defeat a party's appellate rights "where the notice did not mislead or prejudice the appellee") (internal quotation marks omitted). In sum, the Rules are designed to maximize the adjudication of appeals on the merits.

This Court's treatment of claim-processing rules concerning appellate practice is consistent with the overarching goal that the Federal Rules be construed to favor an adjudication of claims on the merits. This Court has noted that the Rules generally should not be construed to require "summary dismissals," and instead should "not only permit, but should as nearly as possible guarantee that bona fide complaints be

carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *see also* Fed. R. Civ. P. 1 (providing that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (citation omitted); *see also Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (recognizing that the Federal Rules of Civil Procedure "are designed to discourage battles over mere form of statement" and that Rule 8(a)(2) "indicates that a basic objective of the rules is to avoid civil cases turning on technicalities") (citations omitted).

In seeking a determination that Rule 23(f) is insusceptible to equitable exceptions (Pet. Br. 17-21), Nutraceutical misreads language from *Manrique v. United States*, 137 S. Ct. 1266 (2017) and *Eberhart v. United States*, 546 U.S. 12 (2005), in which this Court stated that claim-processing rules are "unalterable." *Manrique*, 137 S. Ct. at 1272; *Eberhart*, 546 U.S. at 15. This language, however, is taken from *Kontrick*, which specifically left open the possibility that claim-processing rules "could be softened on equitable grounds[,]" but did not reach the issue because the Court found a forfeiture of the right to enforce the rule. *Kontrick*, 540 U.S. at 456-57. Nor did *Manrique* or *Eberhart* have occasion to address the applicability of equitable exceptions. *Eberhart*, like *Kontrick*, found a

forfeiture of the opportunity to enforce the claim-processing rule at issue, and the question of equitable exceptions therefore did not arise. *See Eberhart*, 546 U.S. at 19. And in *Manrique*, no argument was made that equitable exceptions could apply, and the Court's decision was therefore addressed only to the issues of whether: (i) the claim-processing rule at issue had been violated; and (ii) any violation could be overlooked merely because the Government was not harmed by the violation. *Manrique* and *Eberhart* therefore offer no support for Nutraceutical's argument that Rule 23(f) is insusceptible to equitable exceptions.

In sum, the Federal Rules and this Court's precedents simply do not support Nutraceutical's proposal that Rule 23(f) be interpreted to preclude equitable exceptions.

### D. Court-of-Appeals Case Law Further Shows that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

The courts of appeals additionally recognize that nonjurisdictional claim-processing rules can be subject to equitable exceptions. For instance, the Sixth Circuit recognized that Appellate Rule 15(d) is a claim-processing rule that "permits forfeiture and equitable exceptions to the deadline" and therefore granted a motion to intervene despite the untimeliness of the motion under the Rule. *Int'l Union of Operating Eng'rs, Local 18 v. NLRB*, 837 F.3d 593, 596 (6th Cir. 2016). Similarly, the Second Circuit: (i) recognized that Civil Rule 6(b)(2)—which states that certain deadlines are not extendable—is a nonjurisdictional claim-processing rule and is therefore subject to equitable

exceptions; and (ii) remanded the case to the district court for a decision on whether waiver or an equitable exception applied to the facts presented there. *Legg v. Ulster Cty.*, 820 F.3d 67, 79-80 (2d Cir. 2016). The Seventh Circuit has likewise applied equitable tolling to Civil Rule 58(c)(2)(B). *Carter v. Hodge*, 726 F.3d 917, 919-20 (7th Cir. 2013); *see also Mobley*, 806 F.3d at 577-78 (finding that equitable considerations excused the untimely filing of a motion under Civil Rule 59(e)); *Khan*, 494 F.3d at 258-60 (concluding that a court can recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); *United States v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 216 (3d Cir. 2000) (Alito, J., concurring) (noting that "both the Supreme Court and [the Third Circuit] have recognized an equitable exception to Rule 59"). In sum, the courts of appeals, like this Court, recognize that the Federal Rules can be subject to equitable exceptions.

## III. Rule 23(f) Is Subject to Equitable Exceptions Such as Equitable Tolling

Nutraceutical argues that the time prescription in Rule 23(f) is unusually "emphatic" such that equitable considerations are precluded. Pet. Br. 17-19. This Court's precedents belie Nutraceutical's argument. *See, e.g.*, *Wong*, 135 S. Ct at 1632-33 (concluding that a time prescription stating that an untimely filing "shall be forever barred" was subject to equitable tolling). Moreover, as explained below, applying equitable tolling to Rule 23(f) is entirely consistent with the plain language of the Federal Rules and the purpose and importance of Rule 23(f).

### A. The Federal Rules Confirm that Rule 23(f) Is Subject to Equitable Exceptions

#### 1. The Purpose of Rule 23(f) Confirms that Tolling Is Available

As this Court has recognized in applying tolling in the class-action context, a statute of limitations "does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974). So too with Civil Rule 23(f), which was intended to be applied flexibly. This Court recently recognized that Rule 23(f) "commits the decision whether to permit interlocutory appeal from an adverse certification decision to 'the sole discretion of the court of appeals.'" *Microsoft*, 137 S. Ct. at 1709 (citing Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment). Indeed, "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by [this Court] in acting on a petition for certiorari[,]" and "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. With respect to Rule 23(f) petitions, "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by [this Court] in acting on a petition for certiorari[,]" and "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. Based on this envisioned

flexibility, it only makes sense that the courts of appeals are permitted to take equitable considerations such as tolling into account in deciding whether to permit an appeal. This is especially so where the putative appellant has sought reconsideration in the district court, thus giving the district court an opportunity "to correct [its] own alleged errors" to "prevent[] unnecessary burdens being placed on the court[] of appeals." *Ibarra*, 502 U.S. at 6.

### 2. Appellate Rule 3(a) Confirms that Equitable Exceptions Can Be Applied to Rule 23(f)

In at least two ways, Appellate Rule 3(a) demonstrates that Rule 23(f) can be subject to equitable exceptions. *First*, this Rule provides that "[a]n appellant's failure to take any step other than the timely filing of a *notice of appeal* does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." Fed. R. App. P. 3(a)(2) (emphasis added). Notably, the Rules provide that the failure to timely file a *notice of appeal* (which is required in appeals as of right, but not in appeals by permission under Rule 23(f)) can affect the validity of the appeal, but does not say that the failure to timely file a *petition for permission to appeal*[5] affects the

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[5] Unlike appeals as of right, which require a putative appellant to file a notice of appeal in the district court to transfer jurisdiction from the district court to the court of appeals (*see* Fed. R. App. P. 3(a)(1); Fed. R. App. P. 4(a)(1)(A)), appeals by permission to file, with the court of appeals, a petition for permission to appeal. Fed. R. App. P. 5(a).

validity of the appeal. The Rules draw a sharp distinction between: (i) notices of appeal; and (ii) petitions for permission to appeal. *Compare* Fed. R. App. P. 3(a)(1) and (2) (providing for procedures concerning notices of appeal) *with* Fed. R. App. P. 3(a)(4) (referencing the procedure concerning petitions for permission to appeal). This distinction in the Rules was no accident, as Appellate Rule 3(a) is not the only Rule that differentiates notices of appeal from petitions for permission to appeal. Indeed, in appeals by permission, "a notice of appeal need not be filed." Fed. R. App. P. 5(d)(2).

Because the Federal Rules draw a distinction between notices of appeal and petitions for permission to appeal, it is noteworthy that when Appellate Rule 3(a)(2) discusses missteps that can "affect the validity of the appeal," it refers only to late-filed notices of appeal—and not petitions for permission to appeal. Therefore, like most other provisions in the Federal Rules, a failure to timely file a Rule 23(f) petition for permission to appeal "is ground only for the court of appeals to act as it considers appropriate." Fed. R. App. P. 3(a)(2). A court of appeals faced with a late petition for permission to appeal is therefore empowered—but by no means required—to "dismiss[] the appeal." Fed. R. App. P. 3(a)(2). Because the courts of appeals can "act as [they] consider[] appropriate" in deciding whether to accept late-filed petitions for permission to appeal, the Rules demonstrate that equitable considerations such as tolling and the unique-circumstances doctrine can factor into the analysis.

*Second*, Appellate Rule 3(a)(4) specifies that "[a]n appeal by permission *under 28 U.S.C. § 1292(b)* or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively." Fed. R. App. P. 3(a)(4) (emphasis added). The Rule, however, is silent as to appeals under Rule 23(f)—which was enacted under 28 U.S.C. § 1292(e), not § 1292(b).[6] *Id.*; *see also* Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment (recognizing that Rule 23(f) "is adopted under the power conferred by 28 U.S.C. § 1292(e)"). That Rule 3(a)(4) limits the manner in which parties can take § 1292(b) appeals and bankruptcy appeals—but is silent as to Rule 23(f) appeals—is further evidence that the Rules envision more flexibility with respect to Rule 23(f) appeals. Accordingly, Rule 3(a)(4) is further support that Rule 23(f) is subject to equitable considerations such as equitable tolling.

### 3. Applying Equitable Exceptions to Rule 23(f) Is Fully Consistent with Appellate Rules 26(b) and 2

Nutraceutical's argument that applying equitable tolling to Rule 23(f) runs afoul of Rule 26(b) (Pet. Br. 22-25) fails for multiple reasons.

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[6] Section 1292(b) permits interlocutory appeals only if: (i) the district court determines that there is a controlling question of law on which there is substantial ground for difference of opinion; and (ii) the court of appeals permits an appeal to be taken. Section 1292(e) permits this Court to enact rules to permit other types of interlocutory appeals that are not otherwise permitted by statute. Unlike § 1292(b) appeals, parties seeking a Rule 23(f) appeal need only seek permission to appeal from the court of appeals; permission from the district court is not required.

*First*, Nutraceutical's argument rests on a misreading of Appellate Rule 26(b). Rule 26(b) provides generally that "[f]or good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires." The Rule then carves out some exceptions to this broad proposition, including the prohibition on "extend[ing] the time to file" a petition for permission to appeal." Fed. R. App. P. 26(b)(1). In context, this Rule simply prohibits a court from extending the time to file a petition for permission to appeal based upon the forgiving good-cause standard; it does not speak to equitable tolling. Moreover, Rule 26(b)'s prohibition is limited to "extend[ing] the time to file" a petition for permission to appeal. *Id.* It does not speak at all to permitting a Rule 23(f) petition to be filed after the deadline expires. *See id.* (providing that a court "may permit an act to be done after that time expires"). Accordingly, the plain text of Rule 26(b) does not prohibit the application of tolling—an equitable consideration that comes into play *only after the deadline otherwise would have expired*. Had Rule 26(b) been intended to prohibit a court of appeals from permitting a petition for permission to appeal to be filed after the deadline expires, the Rule could have said so. The plain text of the Rule unambiguously draws a distinction between: (i) extending a time period; and (ii) permitting an act to be done after the time expires. Because the Rule prohibits only the former—and not the latter—with respect to petitions for permission to appeal, this is another strong indication that Civil Rule 23(f) is subject to equitable tolling.

*Second*, applying equitable tolling to claim-processing rules such as Rule 23(f) is no more an impermissible "extension" of the time to appeal under Rule 26(b) than is the application of forfeiture or waiver to rules such as Rule 23(f) or Appellate Rule 4(a)(5)(C). Forfeiture and waiver both involve a court overlooking a violation of a claim-processing rule, yet this Court has never considered the doctrines of forfeiture or waiver to constitute an impermissible "extension" of the appeal period under Rule 26(b). *Eberhart* provides an apt illustration. There, although: (i) a motion for a new trial had been untimely filed under the Federal Rules of Criminal Procedure; and (ii) the Rules expressly prohibited an extension of this time period; this Court found that the Government had forfeited the protection of the Rule, and therefore held that the Seventh Circuit was required to rule on the merits. *See Eberhart*, 546 U.S. at 15-18; *see also Hamer*, 138 S. Ct. at 17, 22 (recognizing that Appellate Rule 4(a)(5)(C) is subject to forfeiture and waiver).

There is no reason to treat equitable tolling differently from forfeiture or waiver, both of which are entirely consistent with Rule 26(b). "A fundamental fallacy underlying [Nutraceutical's] approach . . . is that it confuses extending a limitations period with suspending one." *Henderson v. Shinseki*, 589 F.3d 1201, 1223 (Fed. Cir. 2009) (Mayer, J., dissenting).[7] Contrary to Nutraceutical's suggestion, "[t]olling does not extend any statutory deadline; instead it 'temporarily halts' the running of the statutory clock."

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[7] This Court subsequently granted certiorari and reversed the Federal Circuit's decision that the time prescription at issue was jurisdictional. *Henderson v. Shinseki*, 562 U.S. 428 (2011).

*Id.* (citing *Jaquay v. Principi*, 304 F.3d 1276, 1281 n.2 (Fed. Cir. 2002) (en banc)). Accordingly, Nutraceutical's suggestion that the Ninth Circuit's application of equitable tolling is somehow an impermissible "extension" under Rule 26(b) is simply incorrect. Rather, equitable tolling simply recalibrates the manner in which Rule 23(f)'s 14-day time period is calculated. As applied to this case, equitable tolling simply stopped the 14-day period to file a Rule 23(f) petition until the district court resolved Lambert's motion for reconsideration. This is entirely consistent with Rule 26(b).

Recognizing the express distinction in Rule 26(b) between: (i) extending a time period; and (ii) accepting a late-filed petition for permission to appeal, is consistent with the way in which this Court applies its Rules. For example, this Court's Rules provide that the time for filing an *amicus curiae* brief "will not be extended." Sup. Ct. R. 12.6; *see also* Sup. Ct. R. 37.3(a) (providing that "[m]otions to extend the time for filing an *amicus curiae* brief will not be entertained"). Yet this Court has permitted the filing of *amicus curiae* briefs out of time. *See, e.g.*, *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1452 (2017) (granting motion for leave to file *amicus curiae* brief out of time); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 551 U.S. 1180 (2007) (granting, over the opposition of parties to the case, motion for leave to file *amicus curiae* brief out of time).

Additionally, Appellate Rule 2 is no bar to the application of equitable tolling, contrary to Nutraceutical's arguments. Pet. Br. 25-27. Rule 2 simply provides that Rule 26(b) cannot be suspended.

But because the application of equitable tolling to Civil Rule 23(f) is entirely consistent with Appellate Rule 26(b), as explained above, Appellate Rule 2 simply has no bearing on the availability of equitable tolling.

#### 4. Other Federal Rules Further Confirm that Rule 23(f) Is Subject to Equitable Exceptions

Recognizing equitable considerations with respect to Rule 23(f) is also consistent with the Federal Rules because when a Rule is to be interpreted as mandating an automatic disposition of a claim or defense without regard to the circumstances, it says so explicitly. *See* Fed. R. Civ. P. 12(h)(3) (providing that "[if] the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action) (emphasis added); Fed. R. Civ. P. 55(b)(1) (under certain circumstances, the clerk "must enter judgment" against a defaulting party); *see also* Fed. R. Civ. P. 12(h)(1) (providing that certain defenses are deemed waived if not presented within the prescribed timeframe). Rule 23(f) gives no indication that a district court's extension of time beyond the time period allowed by the Rule should result in automatic dismissal of the appeal, and therefore should not be so interpreted. *See Schacht*, 398 U.S. at 64 (noting that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require"); *see also State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442-43 (2016) (concluding that the violation of a court's seal order under the False Claims Act does not automatically require dismissal of a case, in part because other provisions of the False Claims Act "do

require, in express terms, the dismissal of a relator's action").

In sum, the structure of the Federal Rules supports a construction of Rule 23(f) that gives courts recourse to equitable considerations.

### 5. Nutraceutical's Concessions Highlight that Rule 23(f) Is Subject to Equitable Exceptions

Nutraceutical's argument that Rule 23(f) is not subject to equitable exceptions is also in tension with its recognition that a motion for reconsideration filed within 14 days suspends the time to appeal. *See* Reply for Pet. 5 (recognizing that "a motion for reconsideration can toll Rule 23(f)'s deadline if it is filed before the 14-day deadline in Rule 23(f) expires"); Pet. Br. 43-44. The Ninth Circuit properly recognized that if Rule 23(f) is subject to this supposedly extra-textual exception,[8] there is no reason why tolling should be limited only to motions filed within the 14-day timeframe. Indeed, as the Ninth Circuit correctly explained, Nutraceutical's proposal that tolling should apply only to reconsideration motions filed within 14 days "has no basis in Rule 23 or any other Rule, but instead is a judicial construct. Litigants have no reason to know that their deadline for filing a motion for reconsideration is effectively fourteen days, rather

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[8] As explained in detail above (*supra* Sec. I), recognition that a timely filed reconsideration motion suspends the time to appeal is, in fact, firmly grounded in the text of the Federal Rules. For purposes of this section only, however, Lambert assumes *arguendo* that there is no such explicit textual basis for tolling the Rule 23(f) deadline.

than whatever the district judge has ordered." Pet. App. 16.

If Rule 23(f) truly were as unyielding as Nutraceutical contends, there would be no room for concluding that a reconsideration motion filed within 14 days of a decertification suspends the time to seek appellate review. Nutraceutical points to no principled basis for concluding that equitable exceptions to Rule 23(f) should be so limited, and indeed, none exists. Nutraceutical's recognition that Rule 23(f) is subject to this exception undermines its argument that the 14-day time period is insusceptible to equitable exceptions.

### 6. Nutraceutical's Cited Authority Does Not Demonstrate that Rule 23(f) Is Insusceptible to Equitable Exceptions

Nutraceutical relies heavily on *United States v. Robinson*, 361 U.S. 220 (1960) and *Carlisle* to conclude that Rule 23(f) is insusceptible to equitable exceptions. But neither case is on point.

As an initial matter, it is questionable whether *Robinson* is still good law in view of this Court's subsequent precedents. For instance, *Harris Truck Lines*, *Thompson*, and *Wolfsohn* (discussed in detail above and all decided after *Robinson*) permitted an equitable exception to an appeal-filing deadline, and directed that late-filed notices of appeal be accepted. Moreover, *Kontrick* held that nonjurisdictional claim-processing rules are subject to forfeiture, and expressly left open the possibility that they "could be softened on equitable grounds." *Kontrick*, 540 U.S. at 456-57. Regardless, *Robinson* is readily distinguishable from

the instant case. Importantly, *Robinson* involved a criminal appeal as of right, which was "of relatively recent origin" in federal courts. *Robinson*, 361 U.S. at 226. Based upon the history of the statute authorizing such appeals, it had been "uniformly held" that the deadline to take such an appeal was "mandatory and jurisdictional," and that untimely appeals were "always . . . dismissed regardless of excuse." *Id.* at 226-27.

Rule 23(f), in sharp contrast, governs the time to appeal a specific order in a civil case. When Rule 23(f) was promulgated, it was well-established that the time to appeal in a civil case was extendable based upon the equitable considerations of excusable neglect or good cause, or based upon a putative appellant's failure to receive timely notice of the adverse judgment. *See* 28 U.S.C. § 2107(c). Because the time to appeal in civil cases has long been subject to equitable considerations under certain circumstances, it would be incongruous to interpret Rule 23(f) otherwise, absent clear language evincing a contrary intent. Moreover, *Robinson* did not consider any rule analogous to Appellate Rule 3(a), which, as explained above, strongly suggests that courts of appeals have discretion in whether/how to accept a late petition for permission to appeal. Finally, *Robinson* pre-dates *Harris Truck Lines* and *Thompson*, which make clear that equitable exceptions can apply to appellate filing deadlines.

*Carlisle* is similarly not on point, because contrary to Nutraceutical's argument, that case did not hold that Criminal Rule 45(b) "precluded equitable exceptions." Pet. Br. 9. Rather, the case simply rejected the petitioner's multiple untenable interpretations of the Rule. *Carlisle*, 517 U.S. at 418-

33. Nothing in the majority opinion discussed—let alone decided—whether the Rule could be subject to equitable exceptions.

### 7. Tolling Rule 23(f)'s Time Prescription During the Pendency of a Timely Filed Reconsideration Motion Fulfills the Purposes of the Rules, Whereas Failure to Do So Would Lead to Senseless Inefficiencies

Nutraceutical alleges that subjecting nonjurisdictional claim-processing rules to equitable exceptions will cause a multitude of adverse consequences, such as creating "uncertainty" in class-action litigation (Pet. Br. 11, Pet. Br. 33-34). Nutraceutical also worries that the availability of equitable exceptions will "force[]" courts of appeals "to decide whether a verbal representation at a status conference, a letter, or a call to the clerk's office, was sufficient to toll the Rule 23(f) deadline." Pet. Br. 34.

*First*, Nutraceutical's concerns fail to account for the fact that a court of appeals never has an obligation to accept an interlocutory appeal under Rule 23(f). Indeed, "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by [this Court] in acting on a petition for certiorari[,]" and "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. A putative appellant therefore will have no motivation to miss the Rule 23(f) deadline, because a late petition is very unlikely to be granted. Accordingly, it will be unusual for a party to

miss the Rule 23(f) deadline, and even rarer for a party to invoke equitable exceptions.

The Ninth Circuit, with its routine handling of state-law consumer-fraud class actions, was in the best position to know whether Lambert's petition "present[ed] a novel or unsettled question of law," which courts of appeals use as a major factor in their exercise of their "unfettered discretion." *In re Marietta Mem. Hosp.*, No. 17-0312, 2018 U.S. App. LEXIS 460, at *1-2 (6th Cir. Jan. 8, 2018). In balancing the equities of allowing the 23(f) appeal to go forward, the Ninth Circuit thus weighed the interest of the public in judicial efficiency, which weighed in favor of using the present fairly small and simple case as a vehicle to resolve a split in how district courts interpreted California's Unfair Competition Law and False Advertising Law. *Cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("[W]hen federal courts contemplate equitable relief, our holding must also take account of the public interest."). Because the courts of appeals are in the best position to know what unsettled issues of law divide the district courts within their circuit, an appellate court's decision to grant a 23(f) petition should not be disturbed absent a compelling reason. No such compelling reason exists here.

*Second*, district courts generally need not stay their proceedings while a Rule 23(f) interlocutory appeal is pending. Fed. R. Civ. P. 23(f) ("An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."). Although Nutraceutical complains that delays can be caused when a party seeks to take an interlocutory appeal

(Pet. Br. 31-35), a motion for reconsideration—filed within the time expressly permitted by the district court—is not a significant cause of that delay. Rather, the delay stems from: (i) the amount of time that the district court takes to decide the reconsideration motion—which is not governed by the Federal Rules; and (ii) the district court's discretionary decision to stay proceedings during the appeal. Indeed, in this case, the district court took several months to decide the reconsideration motion. The 20-day period between the original decertification order and the filing of Lambert's reconsideration motion pales in comparison to the several months that the district court took to decide the reconsideration motion.

*Third*, Nutraceutical's concerns about the uncertainty that equitable exceptions could inject into district-court proceedings are unfounded, as is evidenced by the availability of equitable tolling in the statute-of-limitations context. This Court has long held that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland*, 560 U.S. 631, 645-46 (emphasis in original) (quoting *Irwin*, 498 U.S. at 95-96). Nutraceutical makes no suggestion that the availability of equitable tolling in this context has caused an undue burden on the federal courts, even though equitable tolling requires a fact-specific analysis. Similarly, there is no reason to suggest that subjecting Rule 23(f) to equitable tolling should be unworkable. Indeed, for many years, this Court and the courts of appeals have recognized equitable exceptions to nonjurisdictional claim-processing rules. Nutraceutical points to no evidence of any adverse consequences that have arisen from the application of

equitable exceptions in the cases where such exceptions are warranted.

In sum, Nutraceutical's argument for a categorical rule that Rule 23(f) is insusceptible to equitable considerations has no support in this Court's precedents or in the Federal Rules. Nor has Nutraceutical pointed to any negative consequences that have flowed from the many cases that have applied equitable exceptions to nonjurisdictional requirements. The Ninth Circuit's judgment therefore should be affirmed.

Moreover, Nutraceutical's proposed rule would waste party and judicial resources. It would have required Lambert, after the district court stated it would reconsider its order and provided a hearing date and briefing schedule for reconsideration, to nonetheless file a Rule 23(f) petition in order to appeal the initial order being reconsidered.

In this scenario, if Lambert had been successful with the motion for reconsideration, he would have had to dismiss his Rule 23(f) petition, despite the time he spent writing it, the time Nutraceutical spent opposing it, and the time the Motions Panel spent considering it, all a completely wasted effort. If the district court, as it actually did, modified its order but denied certification, Lambert would have had to file a second petition that explained why the new order was in error.

Nutraceutical's position, if adopted, calls for the motions panels of our circuit courts to regularly and needlessly consider Rule 23(f) petitions involving orders that are later amended, expanded upon,

vacated, modified, or withdrawn because of subsequent motions.

Here, there are only two relevant orders, but in other cases district courts deny certification without prejudice or deny certification pending additional evidence or briefing, often several times.[9] Nutraceutical would have class-action litigants on both sides, after receiving unfavorable but non-final decisions on certification, nonetheless barrage circuit courts with petition after petition in order to preserve their right to appeal the eventual final order granting or denying certification. Such a procedure would be inimical to "efficiency and economy of litigation, a principal purpose of Rule 23[.]" *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 (2018). Indeed, in finding that a statutory period for filing an employment-discrimination suit was tolled during the pendency of a class action, this Court recognized that a contrary rule would lead to "an increase in protective filings in all class actions." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983). This Court should not adopt a rule that leads to such inefficiencies. Indeed, what Nutraceutical proposes is that this Court create a new category of protective Rule 23(f) petitions for permission to appeal.

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[9] *See, e.g.*, *Red v. Kraft*, No. 2:10-cv-01028-GW-AGR (C.D. Cal.), ECF Nos. 95, 145, 156, 216, 217, 259 (entertaining three different motions, some with supplemental briefing and supplemental hearings, regarding class certification).

### B. The Importance of Interlocutory Review of Class-Certification Decisions Further Confirms that Rule 23(f) Is Subject to Equitable Exceptions

Nutraceutical wrongly argues that equitable exceptions should not apply to Rule 23(f) because a party who has missed the deadline "is fully entitled to appeal the district court's certification order after final judgment." Pet. Br. 36. This argument is irreconcilable with the Rules Committee's recognition that a class-certification decision can be important enough to warrant an interlocutory appeal. As for plaintiffs who have been denied certification, they may be "confront[ed] . . . with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. As for defendants, an order granting class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Id.* Rule 23(f) meets these concerns "at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues." *Id.* Indeed, the Rules Committee recognized that class-certification orders can be "dispositive of the litigation." *Id.*

This Court has similarly recognized the importance of Rule 23(f), describing it as "the product of careful calibration." *Microsoft*, 137 S. Ct. at 1709. Rule 23(f) was designed to provide class-action litigants with "significantly greater protection against improvident

certification decisions than [28 U.S.C.] § 1292(b) alone offered." *Id.* (citation omitted). Given the potentially high stakes of class-certification decisions, Nutraceutical is simply incorrect to suggest that an appeal after final judgment is an adequate substitute for a Rule 23(f) appeal.

## IV. Nutraceutical's Challenge to the Ninth Circuit's Factbound Application of Equitable Exceptions Here Is Not Fairly Included Within the Question Presented, and, in Any Event, Is Without Merit

### A. Nutraceutical's Factbound Challenge Is Beyond the Scope of the Question Presented and Therefore Should Not Be Considered

Nutraceutical's petition for certiorari made clear that it was seeking review only of whether nonjurisdictional claim-processing rules such as Rule 23(f) can be subject to equitable exceptions, not whether the Ninth Circuit struck the right balance in its weighing of the equities in this particular case. The Question Presented, as framed by Nutraceutical, is whether "the Ninth Circuit err[ed] by holding that equitable exceptions apply to mandatory claim-processing rules and excusing a party's failure to timely file a petition for permission to appeal, or a motion for reconsideration, within the Rule 23(f) deadline[.]" Pet. for Cert. i. Nothing in the Question Presented remotely suggests that Nutraceutical was seeking review of whether the facts of this particular case would warrant equitable tolling or any other equitable exception; nor did anything else in Nutraceutical's certiorari-stage briefing so suggest.

Nevertheless, Nutraceutical now for the first time asks this Court to second-guess the Ninth Circuit's conclusion that under the facts of this case, tolling is warranted. Pet. Br. 38-43. This Court should decline to do so.

"Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not "'fairly included therein.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (citing *Yee v. Escondido*, 503 U.S. 519, 537 (1992)).

This Court regularly denies petitioners' requests to consider issues beyond the scope of the question presented in circumstances strikingly similar to those here. For instance, in one case that this Court accepted to determine the appropriate standard of review, the petitioner attempted to argue that regardless of the standard of review, the judgment should be reversed. *Fry v. Pliler*, 551 U.S. 112, 120-21 (2007). This Court declined to consider that argument, recognizing that it "granted certiorari to decide a question that has divided the Courts of Appeals" and further noting that the question of whether "it matter[ed] which . . . standard is employed" is not the same as "whether the Ninth Circuit misapplied [the standard] in this particular case." *Id.* Similarly, in a case in which certiorari was granted "to decide only [a] purely legal question" regarding a statute of limitations, this Court refused to "go beyond the writ's question to reexamine the fact-based rule-application issue" that the petitioners raised at the merits stage. *Klehr v. A.O.*

*Smith Corp.*, 521 U.S. 179, 193 (1997). Moreover, in a case involving the procedural question of whether a court of appeals is permitted to invoke a nonjurisdictional time bar *sua sponte*, this Court declined the petitioner's invitation to additionally consider whether the Eleventh Circuit had properly interpreted the underlying time bar. *Day v. McDonough*, 547 U.S. 198, 203 n.2 (2006).

This Court should decline Nutraceutical's invitation to rebalance the equities here. Because Nutraceutical's factbound challenge to the Ninth Circuit's application of equitable tolling is neither set out in Nutraceutical's petition nor fairly included therein, the Court should decline to consider it. Indeed, in seeking to disturb the Ninth Circuit's application of tolling to the facts of this case, Nutraceutical asks this Court to "devote[] [its] efforts . . . to addressing a relatively factbound issue which does not meet the standards that guide the exercise of [this Court's] certiorari jurisdiction." *Izumi*, 510 U.S. at 34. As it has done before, this Court should "read the question presented to avoid these tangential and factbound questions." *Fry*, 551 U.S. at 121.

### B. Even if Considered, Nutraceutical's Factbound Challenge Is Without Merit

In any event, Nutraceutical's factbound disagreement with the Ninth Circuit's application of equitable considerations here does not warrant reversal. Nutraceutical's argument that the Ninth Circuit adopted impermissibly "broad" equitable exceptions (Pet. Br. 7-8, 11-12, 30-31, 38-43) is merely a disagreement with the Ninth Circuit's application of equitable tolling to the facts of this case. For instance, Nutraceutical faults the Ninth Circuit for looking to

factors such as: (i) whether Lambert pursued his rights diligently; (ii) whether external circumstances, such as a district-court imposed deadline, affected Lambert; (iii) whether within the 14-day deadline, Lambert took action similar to filing a motion for reconsideration that conveyed his intent to file a written reconsideration motion; and (iv) whether within the 14-day deadline, Lambert explained the basis for the written motion. Pet. Br. 41. But these factors are merely a restatement of the well-established equitable-tolling factors. In particular, equitable tolling is warranted where the proponent shows that: (1) he has been pursuing his rights diligently, and (2) some extraordinary circumstances stood in his way and prevented timely filing. *Holland*, 560 U.S. at 649. Factors (i), (iii), and (iv) above are merely factors that are probative of diligence, and factor (ii) is probative of whether extraordinary circumstances exist.

The Ninth Circuit carefully considered the equities and concluded, based upon this Court's well-established equitable-tolling guidelines, that equitable tolling was warranted. Pet. App. 12-15. There is no basis to disturb that conclusion. As discussed above, the Ninth Circuit was in the best position to determine whether the 23(f) petition should have been granted. Moreover, the Ninth Circuit's decision to permit the appeal to go forward is squarely in line with this Court's longstanding recognition that there are certain "unique circumstances" that permit an otherwise untimely appeal to proceed.

### 1. The Ninth Circuit Correctly Concluded that Equitable Tolling Is Warranted Here

As noted above, equitable tolling is appropriate if the proponent shows that: (1) he has been pursuing his rights diligently, and (2) some extraordinary circumstances stood in his way and prevented timely filing. *Holland*, 560 U.S. at 649. Nutraceutical does not seriously dispute that Lambert was pursuing his rights diligently. Nor could it. As the Ninth Circuit correctly found, Lambert, 10 calendar days after the initial decertification order: (i) clearly conveyed his intention to seek reconsideration; (ii) described the basis for seeking reconsideration; and (iii) otherwise acted diligently. Pet. App. 14. As for extraordinary circumstances, the Ninth Circuit properly found that: (i) the district court "instructed Lambert to file his [reconsideration] motion within ten days, which allotted him twenty days in total from the decertification order[;]" and (ii) Lambert "filed his motion for reconsideration within the period set by the district court." Pet. App. 14. For these reasons, the Ninth Circuit concluded that equitable tolling is warranted. Pet. App. 14-15.

Contrary to Nutraceutical's contention (Pet. Br. 38-39), the Ninth Circuit correctly applied the equitable-tolling factors. Nutraceutical misplaces reliance on *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016), which found that equitable tolling was unwarranted "where the [Menominee Tribe] had mistakenly relied on a district court's order in another case." Pet. Br. 39 (citing *Menominee*, 136 S. Ct. at 757). But here, unlike in *Menominee*, Lambert relied on the

district court's order *in this very case*. When the district court has given erroneous assurances regarding the timeliness of a motion that would ordinarily suspend the time to appeal, this Court has recognized that it is a sufficiently extraordinary circumstance that warrants granting an equitable exception. *Thompson*, 375 U.S. at 385-87. The facts of this case are directly analogous to those in *Thompson*. Therefore, the Ninth Circuit correctly concluded that equitable tolling is warranted.

### 2. The Facts of This Case Are Directly Analogous to *Thompson*, Which Applied the Unique-Circumstances Doctrine

The facts of this case also fall squarely within the unique-circumstances doctrine as articulated in *Thompson* and reiterated in *Osterneck*. In *Thompson*, the petitioner filed a post-trial motion that, if timely filed would suspend the time to appeal until the resolution of the motion. *Thompson*, 375 U.S. at 386. The motion, however, was two days late. *Id.* Nevertheless, the district court stated that the motion was filed "in ample time," and the Government never contended otherwise at the district court. *Id.* Due to these "unique circumstances," this Court concluded that the notice of appeal—filed within 60 days of the resolution of the post-trial motion but not within 60 days of the original decision—should have been deemed timely, and the appeal considered on the merits. *Id.* at 387. Put differently, because: (i) the petitioner "did an act which, if properly done, postponed the deadline for the filing of his appeal[;]" and (ii) "the District Court concluded that the act had been properly done[,]" the

appeal should have been allowed to proceed. *Id.*; *see also Osterneck*, 489 U.S. at 179 (concluding that an appeal should be considered on the merits "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurances by a judicial officer that this act has been properly done").

*Thompson* is directly on point.[10] As in *Thompson*, the district court assured Lambert that his reconsideration motion would be timely if filed by March 12, 2015. In reliance on that assurance, Lambert filed his reconsideration motion on that date, without objection from Nutraceutical. Accordingly, Lambert's motion was properly considered timely, and the Ninth Circuit correctly concluded that the time to file a Rule 23(f) petition ran from the June 24, 2015 disposition of Lambert's reconsideration motion.

## CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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[10] At oral argument, the Ninth Circuit recognized the possibility that this case falls within the unique-circumstances doctrine. Oral Argument at 24:18-42, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181.

Respectfully submitted,

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